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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/036,990	12/31/2001	Ronald L. Edens	17,694	5317

23556 7590 08/05/2004

KIMBERLY-CLARK WORLDWIDE, INC.  
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EXAMINER

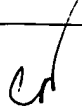
REICHLE, KARIN M

ART UNIT PAPER NUMBER

3761

DATE MAILED: 08/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/036,990	<b>Applicant(s)</b> EDENS ET AL. 	
	<b>Examiner</b> Karin M. Reichle	<b>Art Unit</b> 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 2 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 May 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4, 7, 8, 10-15, 18, 19, 23-27, 30, 31, 33 and 34 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7, 8, 10-15, 18, 19, 23-27, 30, 31, 33 and 34 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 December 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>2/20, 5/3, 5/25 2004</u> | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5-3-04 has been entered.

### ***Specification***

#### ***Drawings***

2. The drawings were received on 5-3-04. These drawings are not approved. The drawings do not overcome all the drawing objections, i.e. the drawings do not show the structure of claim 10, i.e. two notches, described as 100 in the specification, one on the principle transverse axis and one in at least one transverse end area. Figures 2 and 4-5, 7-11 and 16-20 as argued by Applicant does not show such notches 100. Also the Figures now do not show the structure of claims 25 and 33.

3. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the invention as claimed in claims 7, 10, 18, 25, 30 and 33 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled “Replacement Sheet” in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

4. The drawings are objected to because where is F, see page 13, lines 5-30? Where are 102 and 104, see page 17, lines 2-17? Where is Figure 6A? Corrected drawing sheets are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be

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labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 112***

5. Claims 25 and 33 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. These claims now require the notch situated in the at least one longitudinal side also being situated on the principal longitudinal axis and at least one other notch situated in at least one transverse end area and also situated on the principal transverse axis. See page 16, lines 18-21 and page 15, lines 21-24, respectively, i.e. support for the notch in the longitudinal side being on the transverse axis and the notch in the transverse end being on the longitudinal axis. However, where is the support for the claimed structure?

***Claim Language Interpretation***

6. It is noted that while "labial pad" is defined on page 4, lines 20-22 that the claims are drawn to an "absorbent article". "Vestibule" is defined as set forth on page 4, lines 24-31 and page 5, lines 4-6. "Disposition...vestibule" is defined as set forth on page 4, lines 31 et seq, and page 5, lines 10-15 and page 6, lines 1-5. The various directional terms used in the claims are

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defined as set forth on page 5, lines 16-31. "Notch" is defined as set forth on page 15, lines 1-2 and page 17, lines 25-26 and the claim terminology "extends entirely through the z-axis thickness of the absorbent". "Z-axis thickness" is interpreted as set forth on page 5, lines 24-26, i.e. the thickness along an axis generally parallel to the vertical plane which bisects the wearer. It is noted that the thickness is not required to be taken along the principal longitudinal axis x, i.e. the principal z-axis, or that the z-thickness of the absorbent must be uniform. It is further noted that the terminology "vertical", e.g. line 4 of claim 1, and z-axis direction appear to be redundant, see definition on page 5, lines 24-26 again.

### ***Claim Rejections - 35 USC § 102***

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

8. Claims 1-4, 8, 10-15, 19, 23-27, 31, 33-34 are rejected under 35 U.S.C. 102(b) as being anticipated by P & G, PCT '609.

The PG '609 reference, see Claim Language Interpretation section supra and Figures, teaches an absorbent article 20 comprising an absorbent 22(see page 9, lines 11-12) and 24(see page 17, lines 29-30), having superabsorbent, see page 15, lines 1-16, a fluid permeable cover, see page 18, lines 23-29, and a liquid impermeable baffle, see page 17, last three lines. The absorbent, 22 and 24, is situated vertically along a z-axis between the cover and the baffle, see Figures. The absorbent article appears to be configured for disposition within the vestibule as claimed in claims 1, 12 and 24, see claim interpretation section supra, and PG '609, i.e. definition of "interlabial absorbent device" bridging pages 6-7 and the first full paragraph on

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page 8. The article has a principle longitudinal axis L or x, a principle transverse axis T or y, longitudinal sides 24B, transverse end areas adjacent the opposite ends of L or x, a thickness along a vertical z-axis, and the sides and end areas generally form a periphery as seen from above looking down at the body facing surface.

In regard to claims 1-4, 8, 11-15, 19 and 23, since the length of the portions 24 can be greater than that of portion 22, see Figures again, page 8, lines 15-19, page 10, lines 12-15, page 16, lines 19-24, page 20, third full paragraph, a notch is situated in at least one transverse end area on the principal longitudinal axis which extends entirely through a z-axis thickness of the absorbent, extends inward from the periphery to a depth which depth includes a depth of no less than 10 mm but no greater than about 30 mm. The notch also includes a width, i.e. see width of 22 along T or y and page 8, line 22, which is no greater than about 30 mm. The absorbent has a transverse minimum width of no less than about 20 mm, see Figures, page 16, lines 24-29, and thus page 8, lines 25-27, and page 8, lines 19-25, and a z-axis thickness no greater than about 10 mm, see page 16, lines 29 et seq and page 8, lines 25-27.

In regard to claims 24 -27, 31, and 34, since the length of the portions 24 can be less than that of portion 22, see Figures again, page 8, lines 15-19, page 16, lines 19-24, page 20, last paragraph, a notch is situated in both a transverse end area and a longitudinal side, i.e. the four corners (see Exhibit A attached to the FINAL rejection), which extends through the entire z-axis thickness, extends inward from the periphery to a depth (DT, DL in Exhibit) which depth includes a depth of no less than 10 mm but no greater than about 30 mm, i.e. with respect to the depth as measured from the periphery of the transverse end area, DT, see the portions of '609 cited previously in this sentence and with respect to the depth as measured from the periphery of

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the longitudinal side, i.e. the distance from 24B to 24A or DL, see page 16, lines 24-29 and thereby page 8, lines 25-27. The notch also includes a width (WT, WL in Exhibit) which is no greater than about 30 mm, i.e. with respect to the width as measured along the periphery of the transverse end area, WT, see width of 22 along T or y and page 8, line 22 and with respect to the width as measured along the periphery of the longitudinal side, WL, see page 8, lines 15-19, page 16, lines 19-24 and page 20, last paragraph.

With regard to claim 25, see Exhibit A and Figures 2 and 5 of '609, i.e. DL would extend to the principal longitudinal axis.

With regard to claims 10, and 33, see last paragraph on page 20, last paragraph, last sentence, and note "Preferably..." also infers what structure is nonpreferable, i.e. the extensions could be not centered and not extend for at least a third. See attached exhibit B. One of the notches can be considered the notch in the longitudinal side and another one of the notches can be considered the notch in the transverse end area.

The dimensions disclosed by '609 appear to be sufficient to allow the spacing from the perineum or clitoris as claimed in claims 1, 12, and 24, see '609 at portions cited supra. In any case or the second case, with regard to the functions, properties and capabilities set forth in claims 1, 12, and 24, i.e. "being configured...vestibule" and "the depth...when...", see the claim interpretation section supra above and note that the PG device includes the claimed structure.

Therefore, there is sufficient factual basis for one to conclude that the functions, properties and capabilities of such claimed structure would also be inherent in the same structure of PG. See MPEP 2112.01. In still another or third case, Applicant discloses the length of the claimed invention is less than or equal to 100 mm, the maximum width is less than or equal to 70 mm, the



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thickness is 0.5 to 10 mm and the notch having a width and a depth no greater than 30mm. The PG reference discloses, at the portions cited above, lengths and widths, and at page 8, lines 25-27 and page 16, lines 29 et seq the thickness, i.e. the depth of portion 22 and the caliper of portion 24, commensurate to those disclosed by Applicant. Therefore, again there is sufficient factual evidence to conclude that the properties, functions and capabilities of such dimensions would also be inherent in the same dimensions of PG. See MPEP 2112.01. It is noted with regard to claims 4, 15 and 27, the claim does not require all the widths or the largest width being no greater than 30 mm.

***Claim Rejections - 35 USC § 103***

9. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

10. Claims 7, 18 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over PG '609 in view of PG '075.

Applicants claim the cover encloses the absorbent while PG '609 teaches a topsheet and backsheet on opposite sides of the absorbent. See portions of '609 cited supra. However, PG '075 at page 15, fourth full paragraph teaches the interchangeability of such a configuration in which there is a topsheet on the body facing surface and a backsheet on the opposite surface and a configuration in which the topsheet at least partially wraps the labial device absorbent, i.e. can enclose the absorbent. Therefore, to make the topsheet and backsheet on opposite sides of the absorbent of PG '609 a topsheet which encloses the absorbent instead would be obvious to one

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of ordinary skill in art in view of the interchangeability as taught by PG '075. It is noted that the claims do not require the baffle to be liquid impermeable.

### ***Double Patenting***

11. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

12. Claims 1-4, 7-8, 10-15, 18-19, 23-27, 30-31 and 33-34 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending Application No. 10/036,635 in view of PG '609. Although the conflicting claims are not identical, they are not patentably distinct from each other because since the instant application and the other application were filed on the same day, the one way *In re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the claims of the other application? The answer is yes. The claims of the '635 application include all the structure claimed in the instant application except for 1) axes and a periphery defined by longitudinal sides and transverse end areas, and 2) broader ranges of dimensions, e.g. basis weights, and 3) more limited ranges of dimension, e.g. the upper limit of the minimum width of

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the absorbent. With regard to 1) the '635 application claims a generally circular geometry and periphery. See PG '609 at page 16, lines 13-19, i.e. a circular geometry and periphery is exchangeable for a geometry and periphery defined by longitudinal sides and transverse end areas and axes, e.g. a rectangle, a trapezoid. To make the circular geometry and periphery of '635 a periphery defined by longitudinal sides and transverse end areas and instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by PG '609. With regard to 3), where the general conditions of a claim are disclosed in the prior art, i.e. a notch which is spaced from the clitoris or perineum, it is not inventive to discover the optimum or workable ranges by routine experimentation, see *In re Allen et al*, 105 USPQ 233. With regard to 2), it is well settled that omission of an element and its function in a combination is an obvious expedient if the remaining elements perform the same functions as before, see *In re Karlson*, 136 USPQ 184.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Response to Arguments***

13. Applicant's remarks with regard to the formalities have been noted but are either deemed moot in that the discussed issues have not been reraised or are deemed not persuasive for the reasons set forth supra. Applicant's remarks with regard to the prior art rejections are deemed not persuasive. See rejections supra. Applicant's remarks with regard to the double patenting rejections and the terminal disclaimers have been noted. However, the language of paragraph 1 after the subheading "Provisional Terminal Disclaimer", i.e. "In the event...", is still

not deemed proper by the reviewing paralegal since if the application is a good reference it should not matter which issues first, i.e. the terminal disclaimer must disclaim unconditionally, no provisional language should be included.

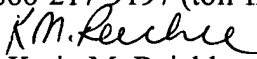
### ***Conclusion***

14. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. PCT '078 already of record teaches the article can be butterfly shaped. The Woon Weisman and Olsen '150 references are cited to show what is considered butterfly shaped in the art. The Rabell reference is cited to show an appliance with notches, see Figure 7.

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (703) 308-2617. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703) 308-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Karin M. Reichle  
Primary Examiner